

STATEMENT OF RELEVANT FACTS

I. Factual and Procedural Background

In early 2012, an unfair labor practice charge was filed with the NLRB against Appellant by Fred Pflantzer. Mr. Pflantzer, a former employee of NYPS¹ who worked as a tour guide, alleged that Appellant had violated the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151-169, by reducing his workload and subsequently terminating him in retaliation for engaging in union organizing and other protected concerted activity. The NLRB’s Region 2 Office in New York City (“the Region”), on behalf of the Board’s General Counsel, investigated the merits of the charge. On May 30, 2012, the Region issued an unfair labor practice complaint alleging that Appellant’s discharge of Mr. Pflantzer violated the Act, as the charge had alleged.

Following a hearing, on September 19, 2012, Administrative Law Judge Raymond P. Green issued a decision, finding that Appellant violated the Act by discriminatorily discharging Mr. Pflantzer. Judge Green also issued a recommended order that required NYPS to, inter alia, “offer [Mr. Pflantzer] reinstatement and [by providing backpay] make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.”

¹ NYPS and its affiliates in Washington, DC and Las Vegas, Nevada do business as OnBoard Tours.

Following the parties' filing of exceptions, the Board issued a Decision and Order dated May 2, 2013, in which it affirmed and adopted Judge Green's decision and recommended order in all material respects. *See N.Y. Party Shuttle, LLC*, 359 NLRB No. 112, slip op., at 1-2.

On May 30, 2013, NYPS petitioned for review of the Board's Order in the United States Court of Appeals for the Fifth Circuit. On November 19, 2013, upon NYPS's failure to timely file its opening brief, the Fifth Circuit entered a default judgment enforcing the Board's Order in full. *See N.Y. Party Shuttle, LLC v. NLRB*, No. 13-60364 (5th Cir.). NYPS did not seek Supreme Court review. The judgment is therefore final.

Following the Fifth Circuit's enforcement of the Board's Order, the Region and the NLRB's Contempt, Compliance, and Special Litigation Branch ("CCSLB") in Washington, DC made repeated attempts to ensure NYPS's compliance with the Order.²

² For example, in the face of NYPS's refusal to disclose payroll and other records necessary to analyze the amount of backpay due to Mr. Pflantzer, CCSLB issued and subsequently obtained judicial enforcement of an administrative subpoena for those records. *See NLRB v. N.Y. Party Shuttle, LLC*, No. 14-mc-410 (S.D.N.Y. Jan. 28, 2015) (order enforcing subpoena docketed as Document 18) ("The investigative subpoena is entirely reasonable and NYPS shall fully comply with the NLRB's subpoena.").

II. The Subpoena at Issue

In or around December 2014, the NLRB received information about certain financial problems relating to the operations of NYPS's New York City location. In an e-mail dated December 11, 2014 and addressed to "Team," NYPS owner C. Thomas Schmidt admitted that the company was experiencing "cash flow problems." The e-mail acknowledges that sales were down "significantly" in 2014 and attributes the downturn to new competition in double-decker tours. This new competition, along with "other factors," according to the e-mail, made cash flow "extremely difficult." The e-mail further states that Schmidt was working night and day talking to investors about "putting in more capital" and, in the meantime, trying to resist having to shut down tours and lay people off. Additionally, the e-mail states that while employees were going to get paid, checks for independent contractors were going to be held until further notice. (*See* Case No. 15-MC-233-P1; Doc. 13; attached as **Exhibit A**).

Concerned that Appellant may have insufficient funds to satisfy its backpay obligation pursuant to the Fifth Circuit's November 19, 2013 judgment, CCSLB commenced an investigation into whether there exist other entities which may be derivatively liable for Appellant's financial obligations. As part of its investigation into derivative liability, CCSLB sent Appellant Subpoena *Duces Tecum* B-733373 (the "Subpoena") (attached **Exhibit B**) on March 26, 2015. The Subpoena requires

production of certain documents, such as manuals and handbooks, applicable to any persons who, during relevant time periods, provided driver or tour guide services for Appellant in New York City or for affiliated operations in Washington, DC and Las Vegas, Nevada, all of which do business under the same name. *See supra* note 1. The Subpoena also seeks responses to interrogatories requesting disclosure of the financial institutions and account numbers holding assets of NYPS and the affiliated entities during relevant time periods.

NYPS filed a petition to revoke the Subpoena with the Board on April 7, 2015. *See* 29 U.S.C. § 161(1). On June 12, 2015, the Board denied the petition, noting that it was untimely and that, in any event, the Subpoena “sought information relevant to matters under investigation and describe[d] with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board’s rules and regulations.” (**Exhibit C**).

Following Appellant’s continued refusal to obey, the NLRB filed an application with the Southern District of New York to have the Subpoena enforced. *See* 29 U.S.C. § 161(2). On August 27, 2015, the District Court entered an Order requiring Appellant to comply with the Subpoena. *See* Decl. of James M. Felix, Ex. B. Relying on this Court’s decision in *NLRB v. C.C.C. Associates, Inc.*, 306 F.2d 534, 539 (2d Cir. 1962), the District Court concluded that “[t]he information sought relates to a matter under investigation and is relevant to determining the

derivative liability of entities that may be associated with NYPS.” Felix Decl. Ex. B, at 1. In response to NYPS’s concern that the subpoenaed information was confidential, the District Court additionally directed the parties to submit a protective order for its consideration. *Id.* at 2.

NYPS filed a motion for reconsideration with the District Court, and it was denied on November 12, 2015. *See* NLRB v. New York Party Shuttle, No. 15 Misc. 233 (JFK) (S.D.N.Y.) (opinion and order docketed as Document 24 and attached hereto as **Exhibit D**). That same day, the District Court approved the Board’s proposed protective order, which directed NYPS to comply in full with the Subpoena “within 14 days.” Felix Decl. Ex. C, at 1.

III. The Emergency Motion for Stay Pending Appeal

As the 14-day compliance deadline specified in the protective order was approaching, NYPS filed a declaration and memorandum in support of its Emergency Motion for Stay Pending Appeal with this Court (Doc. 28).³ Appellant seeks to delay compliance with the Subpoena, as directed by the District Court’s November 12, 2015 Orders. First, Appellant attempts to show a likelihood of success by arguing that the Subpoena is overbroad because it purportedly attempts

³ Upon learning of NYPS’s intent to file its Emergency Motion by the day before Thanksgiving, the NLRB agreed to extend NYPS’s deadline for compliance by one week to December 4, 2015. This modest, one-week extension reflected a determination that it would be impossible for the Board to submit an opposition to Appellant’s Motion in advance of the original compliance deadline.

to seek financial information related to “net worth discovery” (Appellant’s Mem. of Law at 5-6). Second, Appellant posits that it will be irreparably injured absent a stay because the information sought by the Board “could be misused or used by [discriminatee Pflantzer] in subsequent litigation, or used . . . to gain a competitive advantage in setting up competing businesses.” (*Id.* at 7). Third, Appellant maintains that issuance of a stay will not substantially injure the parties. Finally, Appellant concedes the “public interest in promoting the goals of the NLRB,” but asserts that a stay “does not frustrate any of these goals.” (*Id.* at 8). As explained below, these arguments are meritless, and Appellant’s stay motion should be denied.

APPLICABLE LEGAL STANDARD

Courts weighing motions to stay consider four factors:

- (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *see also Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002) (same); *Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993) (same). This Court has noted that the degree to which a factor must be present varies with the strength of the other factors, meaning that “‘more of one [factor] excuses less of the other.’” *Thapa v. Gonzales*,

460 F.3d 323, 334-35 (2d Cir. 2006) (quoting *Mohammed*, 309 F.3d at 101).

Notably, the party seeking a stay “bears the burden of establishing its need.” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97 (2d Cir. 2012) (quoting *Clinton v. Jones*, 520 U.S. 681, 708 (1997)).⁴

ARGUMENT

I. Appellant Cannot Show a Likelihood of Success on the Merits

In its motion, Appellant continues to put forth the specious argument that the Board’s subpoena is overbroad. The District Court properly concluded that the Board’s subpoena seeks information relating to a matter under investigation and “is relevant to determining the derivative liability of entities that may be associated with [Appellant].” Felix Decl. Ex. B, at 1. In denying Appellant’s reconsideration request, the District Court again noted that NYPS has not put forth any new evidence or caselaw that was previously overlooked. *See* NLRB Ex. D at 1.

Notably, “[f]or purposes of an administrative subpoena, the notion of relevancy is a broad one.” *Sendsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 882 (5th Cir. 1989); *see also In re McVane*, 44 F.3d 1127,

⁴ NYPS did not specifically seek a stay pending appeal in the District Court prior to filing its stay motion in this Court, as required under FRAP 8(a)(1). However, it is the Board’s position that NYPS effectively requested a stay pending appeal in its Opposition to the Board’s Proposed Protective Order (Case No. 15-MC-233-P1; Doc. 18). In that document, NYPS argued that it should not be required to comply with the District Court’s August 27, 2015 Order until all of its appeals of that Order are exhausted (*Id.* at 3 ¶ 4).

1136 (2d Cir. 1995) (“We have interpreted relevance broadly.”); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1517 (D.C. Cir. 1993) (“We believe that ‘a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance.’”) (quoting *FTC v. Texaco*, 555 F.2d 862, 877 (D.C. Cir. 1977) (en banc)). A Board subpoena seeks relevant information “if the material subpoenaed touches a matter under investigation.” *NLRB v. Rohlen*, 385 F.2d 52, 57 (7th Cir. 1967).

The subpoena in question easily satisfies this broad standard. Appellant claims that “financial information about [affiliated entities] and NYPS has no bearing on the causes of action asserted by [discriminatee Pflanzter].” However, there are several outstanding issues in this case, and merely liquidating the amount of backpay owed to Mr. Pflanzter under the Board’s court-enforced remedial order will not close this case. That backpay must *actually be paid*, and thus both an employer’s own ability to pay and the potential derivative liability of related entities or individuals are proper subjects of a compliance investigation. *See C.C.C. Assocs.*, 306 F.2d at 538-40; *Brooklyn Manor Corp. v. NLRB*, No. 99 MC 117, 1999 WL 1011935, at *2 (E.D.N.Y. Sept. 22, 1999) (“The NLRB may ... utilize investigative subpoenas to determine a party’s derivative liability for the obligations of another.”). The purpose of the subpoena in question is to determine

potential derivative liability for Appellant's backpay obligations. Accordingly, it seeks relevant information that "touches a matter under investigation." *Rohlen*, 385 F.2d at 57.

Appellant additionally attempts to confuse this Court by including, for the first time in these proceedings, a puzzling discussion on the appropriateness of "net worth discovery" in the context of punitive damages awards. As previously mentioned, the Board's inquiry into potential derivative liability relates to whether Appellant or other related entities may be able to satisfy Appellant's backpay obligations under the Board's Court-enforced Order.⁵ At no point has the NLRB engaged in net worth discovery or sought punitive damages in this matter, and as a result, Appellant's cited authorities are completely inapposite. As such, Appellant has not made a showing, let alone a strong showing, of a likelihood of success on the merits.

II. Appellant Will Not Suffer Irreparable Harm Absent a Stay

Irreparable harm must be "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) (citations omitted). Appellant has not provided any concrete evidence that it will suffer actual and imminent harm. Instead, NYPS expresses a theoretical

⁵ Appellant claims that the Board merely "alleges" that NYPS has violated the Act. (Appellant's Mem. of Law at 4). Appellant utterly fails to account for the final and binding Fifth Circuit Judgment finding that NYPS, in fact, violated the Act.

concern that the financial information the Board seeks *could* be misused at some point in the future. This remote concern is insufficient to constitute irreparable harm. It also overlooks the provisions of the District Court's protective order. Indeed, the very purpose of the protective order is to prevent the unnecessary dissemination of the financial information requested by the Subpoena.⁶

III. Issuance of a Stay Will Substantially Injure the Other Parties Interested in the Proceeding

The subpoena at issue was served on Appellant some nine months ago after the Board received credible and, to date, unrefuted information indicating that NYPS had "cash flow problems." A stay pending Appellant's appeal of the District Court's enforcement of the Subpoena would only further delay the Board's legitimate investigation into the possible derivative liability of NYPS's related entities, and the ultimate satisfaction of Appellant's monetary liability pursuant to the Board's Court-enforced Judgment. Thus, the potential harm to the Board and

⁶ Although Appellant does not make the argument, it should also be noted that compliance with the Subpoena will not moot the instant appeal. *See Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992). The Supreme Court has reasoned that there is a possessory and privacy interest in one's papers, and that, if a subpoena is improperly issued or enforced, a court has the power to effectuate at least a partial remedy for an improper invasion of these interests by ordering the government to return or destroy all subpoenaed materials it has in its possession. *Id.* at 13, 15. The Supreme Court declared that "[t]he availability of this possible remedy is sufficient to prevent this case from being moot." *Id.* at 15; *see also U.S. Commodity Futures Trading Comm'n v. Parnon Energy Inc.*, 593 F. App'x 32, 35 (2d Cir. 2014) (approvingly citing *Scientology* decision).

to Mr. Pflantzer should a stay be granted would outweigh any purported harm to Appellant should it produce the subpoenaed information subject to a protective order.⁷

IV. The Public Interest Weighs in Favor of Denying a Stay

In enacting the National Labor Relations Act, Congress gave the Board the dual responsibility of protecting employees in their organizational rights, and preventing and adjudicating the commission of unfair labor practices. In carrying out its statutory duties to investigate, prosecute, and remedy alleged unfair labor practices, the Board acts in the public interest. *NLRB v. Vibra Screw, Inc.*, 904 F.2d 874, 876 (3d Cir. 1990); *Singer Co. v. NLRB*, 429 F.2d 172, 178 (8th Cir. 1980); *Martin v. Yellow Freight Sys., Inc.*, 793 F. Supp. 461, 466 (S.D.N.Y. 1992) *aff'd*, 983 F.2d 1201 (2d Cir. 1993). The Subpoena was issued in this case after the Board received evidence indicating that Appellant may have insufficient funds to comply with the Fifth Circuit's November 19, 2013 Judgment enforcing the Board's underlying order, which directed NYPS to reinstate Mr. Pflantzer and

⁷ Notably, the matter at hand is markedly different from the procedural posture of Appellant's cited authority on this point. In *SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158 (2d Cir. 2012), a district court rejected the parties' settlement agreement and ordered a prompt trial. *Id.* at 160, 166. In considering whether to grant a stay on an interlocutory appeal, this Court found "no appreciable harm to anyone" since a stay does "nothing more than maintain the status quo existing prior to the district court's order" *Id.* at 168. In sharp contrast to that case, the harm to the Board here will be quite substantial as Appellant's continued failure to produce the requested financial information and other documents will frustrate the Board's ability to collect backpay pursuant to its Court-enforced Order.

provide him with backpay. The District Court below has already reviewed the relevant documentary evidence and has determined that the Board has a valid “basis for its belief that an inquiry into potential derivative liability is necessary.” Felix Decl. Ex. B, at 2.

By comparison, Appellant asserts no public interest to support a stay. In fact, Appellant expressly concedes “the public interest in promoting the goals of the NLRB.” Appellant’s Mem. of Law at 8. Nonetheless, Appellant claims that the public interest supports a stay because this Court may ultimately reverse the District Court on the merits. *See id.* But this argument makes little sense. If the mere possibility of prevailing on the merits meant that the public interest favored a stay, every appellant could argue for a stay pending appeal on this basis.

CONCLUSION

A stay is unwarranted here because Appellant cannot show a likelihood of success on the merits. Additionally, none of the other factors for granting a stay have been satisfied in this instance. Appellant has not shown any irreparable injury absent a stay, especially since the approved protective order minimizes the risk of unauthorized release of information. Moreover, the Board has demonstrated that its ability to conduct its investigation into potential derivative liability and subsequently collect on its Court-enforced Order will be substantially impaired by issuance of a stay. Given the Board’s overall mission, the public

interest also weighs in favor of denying a stay. For these reasons, the Board respectfully requests that this Court deny Appellant's Motion.

Respectfully submitted,

KEVIN P. FLANAGAN
HELENE LERNER
Supervisory Attorneys

DAVID H. MORI
Senior Trial Attorney

/s/ Igor Volynets
IGOR VOLYNETS
Attorney

National Labor Relations Board
Contempt, Compliance,
and Special Litigation Branch
1015 Half Street, S.E., Fourth Floor
Washington, DC 20570

DATE: December 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing using the Court's CM/ECF filing system, thereby providing service to James M. Felix and C. Thomas Schmidt, counsel for New York Party Shuttle, LLC.

/s/Igor Volynets
Igor Volynets
Attorney

DATE: December 1, 2015



United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
CONTEMPT, COMPLIANCE, AND SPECIAL LITIGATION BRANCH
1015 Half Street, S.E., Room 4029
Washington, D.C. 20005
Tel: 202-273-1947
Fax: 202-273-4244

August 24, 2015

Honorable Analisa Torres
United States District Court
for the Southern District of New York
United States Courthouse
500 Pearl Street, Courtroom 15D
New York, NY 10007-1312

Re: *National Labor Relations Board v. New York Part Shuttle, LLC*,
No. 1:15-mc-00233-P1

Dear Judge Torres:

We are submitting this letter in response to your order (Doc. # 12) dated August 24, 2015, requesting additional information from the National Labor Relations Board ("NLRB") in the above-captioned matter. Specifically, this court has requested information as to 1) why the NLRB has concluded that there are cash flow problems relating to the operations of New York Party Shuttle, LLC ("NYPS") at its New York City location, and 2) the relationship between NYPS and the entities whose records are sought by the NLRB's subpoena.

With regard to the court's first inquiry, the NLRB, in December 2014, received from a witness a copy of an e-mail sent to some employees of NYPS from "Tom" (i.e., C. Thomas Schmidt, the owner of NYPS). The e-mail, dated December 11, 2014, and addressed to "Team," details admitted "cash flow problems." The e-mail acknowledges that sales were down "significantly" in 2014, because of the new competition in double-decker tours. This new competition, along with "other factors," according to the e-mail, has made cash flow "extremely difficult." The e-mail further states that Schmidt was working night and day talking to investors about "putting in more capital" and, in the meantime, trying to resist having to shut down tours and lay people off. Additionally, the e-mail states that while employees were going to get paid, checks for independent contractors were going to be held until further notice. A copy of this correspondence is enclosed. We have not included forwarding information, out of concern that it may reveal the identity of the witness who provided us with the copy.

The NLRB also has in its possession a second e-mail from Schmidt to an employee of NYPS. This e-mail was sent by Schmidt in December 2014 and further details the company's cash flow problems. We have not enclosed a copy of this e-mail

Exhibit A

out of concern that it will reveal the identity of the person who provided it to us. *See Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 158 (E.D.N.Y. 1986) (discussing government's privilege to withhold from disclosure the identity of persons who furnish information concerning violations of the law to officers charged with enforcement of that law.)¹

With regard to the court's second inquiry, besides NYPS, the subpoena seeks information concerning OnBoard Tours, Party Shuttle Tours, LLC, Washington DC Party Shuttle, LLC ("DCPS"), and OnBoard Las Vegas Tours, LLC ("OBLV") as part of its investigation into the matter of derivative liability.² The evidence gathered by the NLRB thus far establishes that OnBoard Tours is the d/b/a of NYPS, DCPS, and OBLV. Among other things, we have obtained sworn testimony from witnesses that Party Shuttle Tours, LLC, may be a holding company of the other LLCs. The documentary and testimonial evidence gathered by the NLRB strongly suggests that Schmidt, based in Houston, Texas, is the owner of all of the LLCs and asserts managerial, supervisory and financial control over these entities, particularly NYPS, DCPS, and OBLV.³

We will promptly provide additional information, should the Court require.

Sincerely,

s/ Igor Volynets
IGOR VOLYNETS, ATTORNEY
igor.volynets@nlrb.gov

¹ Further supporting the NLRB's conclusion that NYPS has cash flow problems are evidence of tax liens issued by the State of New York against the company in the amounts of \$35,975.00, \$14,097.00, \$3,433.00, \$18,123.00 between October 2013 and July 2014.

² Because of the above-described cash flow problems of NYPS, the NLRB launched an investigation into whether any of the other LLCs may be held liable for the as-yet-to-be-liquidated monetary amount owed by NYPS in *New York Party Shuttle, LLC v. NLRB*, No. 13-60364 (5th Cir.).

³ These documents are protected from disclosure to respondent by the informer's privilege (*see, e.g., NLRB v. Laborers Local 1140*, 78 LRRM 2635, 2637 (8th Cir. 1971); *NLRB v. Truck Drivers Local 282*, 78 LRRM 2793 (2d Cir. 1969); *Roviaro v. U.S.*, 353 U.S. 53, 59 (1957)), and the work product privilege. *See Hickman v. Taylor*, 329 U.S. 495, 510-13 (1947); *NLRB v. Laborers Local 1140*, 78 LRRM at 2637.

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing using the Court's CM/ECF filing system and e-mailed the foregoing to James M. Felix, counsel for New York Party Shuttle, LLC, at jfelix@kilhennyfelix.com.

s/ Igor Volynets
IGOR VOLYNETS

Volynets, Igor

Subject: FW: NYPS Paychecks

----- Forwarded message -----
From: **Tom Schmidt** <tom@onboardtours.com>
Date: Thu, Dec 11, 2014 at 12:49 PM
Subject: NYPS Paychecks
To: Fred <fred@onboardtours.com>

Access to Experts. Access to Deals. Access to Capital.

[View this email in your browser](#)

Team:

I am aware of the issues with paychecks, and wanted to address them with you. It is not a secret that our sales are down significantly this year, in large part because of the new competition in double-decker tours. That and other factors have made cash flow extremely difficult. In addition, we recently had to renew our bus insurance, renew our worker's comp insurance, and pay several other large items that contributed to the problem. We are working hard to cut expenses to offset the decline. We have also advertised specials and package deals on our tours to spur sales. We are working to maintain the minimal amount of marketing we must do in order to keep people purchasing tours. We are working on putting together some changes to our tour lineup to make our products more attractive to customers. All of those efforts take time to have an effect.

In the meantime, I am working night and day talking to investors about putting in more capital. A couple deals I got done about 3 weeks ago led to paychecks clearing faster and allowing us to make some of the large payments described above. I will keep working in coming weeks on that effort.

As I have said before, this company is too valuable for me to shut it down. We provide the best tours in NYC, thanks to the effort you guys put in, and customers love our company. I will do everything in my power to get through this process. Additionally, I am trying to resist having to shut down tours and lay

people off. We want that to be a last option rather than a first option so that you can continue to have work.

I realize that this is stressful for you. It is also stressful for Fred and for me and for everyone. If we stick together, we will get through this rough period and get the company back in shape as we get more investors to contribute and our sales and expense-cutting efforts kick in.

I have instructed Fred to handout paychecks today to those people who are employees. Checks for independent contractors will be held until further notice, so that at least the majority of employees can be paid first. That should also help you get paid faster.

I have also heard that some people have expressed that they have tried to contact me and that I have not responded. Please understand that I am on the phone all day every day, and/or in meetings. I receive over 100 calls per day, and several thousand emails. If you have a specific question or concern you want to get to me, the best way to do that is to send me an email with "For Tom" in the subject line. That way, my email system will flag the email as important. I typically respond to emails in the middle of the night, so don't be surprised if it takes a while for me to respond. Obviously, as much as I would like to talk to each of you every day, it makes more sense for me to focus my efforts on solving the cash flow problems, and there are just not enough hours in the day for me to do both.

I wish I had better news for the short term, but I want you to know that we are not ignoring the problem. We will get through this period and end up with a stronger company at the end of the day. I thank you all for your continued service to the company.

Thanks.

Tom

Copyright © 2014 OnBoard Tours, All rights reserved.

You are receiving this email because you work with OnBoard Tours

Our mailing address is:

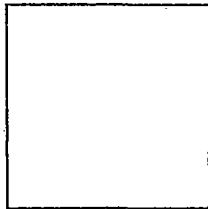
OnBoard Tours

1650 Broadway

New York, NY 10019

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[unsubscribe from this list](#) [update subscription preferences](#)



Fred Moskowitz
President OnBoard New Your Tours
212 852 4821 (office)
760 683 2252 (fax)

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records, New York Party Shuttle, LLC, 7880 San Felipe, Suite 210
Houston, TX 77063

As requested by David H. Mori, Attorney
whose address is 1099 14th Street, NW, Suite 10700, Washington, D.C. 20005
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO ~~APPEAR BEFORE~~ mail or email to
David H. Mori (david.mori@nrlrb.gov) of the National Labor Relations Board
at the address above

~~in the City of~~
by ~~on~~ the 6th day of April 20 15 ~~at~~ documents requested in the Attachment to Subpoena Duces Tecum
~~or rescheduled date to testify in~~
in re New York Party Shuttle, LLC v. NLRB, No. 13-60364 (5th Cir. 2014).
(Case Name and Number)

~~And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:~~

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

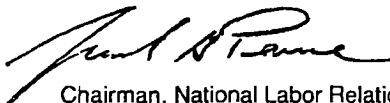
B - 733373

Issued at Washington, D.C.



this 26th day of March

2015


Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Exhibit B

ATTACHMENT TO SUBPOENA DUCES TECUM

DEFINITIONS AND INSTRUCTIONS

1. **"OnBoard Tours,"** as used herein, refers to the following entities, individually and collectively: OnBoard Tours, whose CEO and founder is Tom Schmidt, with operations in New York City, Las Vegas, and Washington, D.C.; Party Shuttle Tours, LLC; New York Party Shuttle, LLC; Washington DC Party Shuttle, LLC; and OnBoard Las Vegas Tours, LLC.
2. "Any," "each," and "all" shall be read to be all inclusive and to require the production of each and every document responsive to the request in which such terms appear.
3. "And" and "or" and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively, so as to make the request inclusive rather than exclusive, and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.
4. As used herein, the term "person" means any natural person, corporation, partnership, proprietorship, association, organization, trust, joint venture, or group of natural persons or other organizations.
5. As used herein, the term "documents" " include but are not limited to the following items, whether printed or recorded or produced by any other mechanical, electrical or digital process, or written or produced by hand: agreements, communications, reports, facsimiles, correspondence, telegrams, memoranda, summaries of records or telephone conversations, summaries or recordings of personal conversations or interviews, diaries, notebooks, calendar entries, notes, charts, plans summaries or records of meetings or conferences, transcripts or summaries or reports of investigations or negotiations, brochures, pamphlets, advertisements, circulars, press releases, drafts, letters, internal or inter-office memoranda or correspondence, questionnaires or surveys and responses thereto, employment applications, employment or personnel files, job description, lists and marginal comments appearing on any document, video tapes, recordings and transcriptions or summaries thereof, licenses, certificates, computer databases, including but not limited to electronic mail messages and any other information stored by computer and all other writings or recordings of any variety. Additionally, the tem "document" refers to any attachments to or enclosure with each document.
6. Documents subpoenaed shall include all documents in your physical possession, custody or control, your present or former supervisors, agents, attorneys, accountants, advisors, investigators, and any other persons and companies directly or indirectly employed by, or connected with you.
7. If any document responsive to any request herein was, but no longer is, in your possession, custody or control, identify the document (stating its date, author, subject,

recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control, and identify (stating the person's name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.

8. If any document responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons, identify the document (stating its date, author, addressee(s), recipients and intended recipients, title and subject matter); explain the circumstances surrounding the destruction, discarding or disposal of the document, including the timing of the destruction, identify all personnel who authorized the destruction, discarding or disposal of the document, and identify all persons known or believed to have the document or a copy thereof in their possession, custody or control.

9. Should you claim that any of the requested information is privileged, such claim shall specify in detail all the grounds on which such claim rests.

10. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

11. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

12. All documents produced pursuant to this subpoena should be organized by what subpoena paragraph each document or set of documents are responsive to, and labels referring to that subpoena paragraph should be affixed to each document or set of documents.

13. When addresses and telephone numbers are requested, both business and home addresses and telephone numbers are required.

14. If any request seeks documents/information already produced under a prior subpoena from the National Labor Relations Board, identify the subpoena, the date of its issuance, and the specific subpoena request, as well as describe the documents/information produced, the date of production, the location of production, proof of production, and the person(s) to whom the documents/information were produced.

DOCUMENTS REQUESTED



Pursuant to § 11(1) of the National Labor Relations Act, 29 U.S.C. § 161, you are hereby directed to produce the following documents:

1. Copy of Fred Pflantzer's personnel file, as well as copies of any documents, including, but not limited to, non-compete agreements, that OnBoard Tours had Pflantzer sign.
2. Copies of documents, including, but not limited to, manuals, handbooks, internal memoranda, and contracts showing any and all work rules, policies, and procedures applicable to any persons who provided driver services and tour guide services for OnBoard Tours in New York City, Las Vegas, and Washington, D.C., during the periods from October 1, 2011 through August 31, 2012, and from January 1, 2014 to the present.

INTERROGATORIES

Pursuant to § 11(1) of the National Labor Relations Act, 29 U.S.C. § 161, you are hereby directed to provide full and complete written responses, under oath, to the interrogatories set forth below:

1. Provide the names and addresses of all financial institutions, including banks, where any accounts have been maintained by, or on behalf of, OnBoard Tours, Party Shuttle Tours, LLC, New York Party Shuttle, LLC, Washington DC Party Shuttle, LLC, and OnBoard Las Vegas Tours, LLC, during the periods from October 1, 2011 to August 31, 2012, and from January 1, 2014 to the present.
2. For each financial institution provided in response to Interrogatory No. 1, provide the type of accounts at those financial institutions (e.g., business checking or business savings) and their account numbers.

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<input type="checkbox"/> C.O.D. If C.O.D. enter amount to be collected and attach completed UPS C.O.D. tag to package.			\$ AMOUNT				
7 ADDITIONAL HANDLING CHARGE	<input type="checkbox"/> An Additional Handling Charge applies for certain items. See instructions.						
TOTAL CHARGES							
8 METHOD OF PAYMENT	<input checked="" type="checkbox"/> BILL SHIPPER'S ACCOUNT NUMBER	<input type="checkbox"/> BILL RECEIVER DOMESTIC ONLY	<input type="checkbox"/> BILL THIRD PARTY	<input type="checkbox"/> CREDIT CARD	<input type="checkbox"/> CHECK		
RECORD ACCOUNT NO. IN SECTION 9							
9 RECEIVER'S/THIRD PARTY'S UPS ACCT. NO. OR MAJOR CREDIT CARD NO.						EXPIRATION DATE	
THIRD PARTY'S COMPANY NAME							
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10 SHIPPER'S SIGNATURE						DATE OF SHIPMENT	
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW YORK PARTY SHUTTLE, LLC

and

Case 02-CA-073340

FRED PFLANTZER

ORDER¹

The Petition to Revoke subpoenas duces tecum B-733367, B-733371, B-733372, B-733373, and B-733374 is denied as untimely. Section 11(1) of the Act and Sections 102.31(b) and 102.111 of the Board's Rules and Regulations require that a petition to revoke an investigative subpoena must be filed within 5 days after the date of service of the subpoena. The subpoenas here were served on March 27, 2015. Thus, the petition, which was filed on April 7, 2015, is untimely.

In addition, even assuming that the petition was timely filed, it is lacking in merit.² The subpoenas seek information relevant to the matters under investigation and describe with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Further, the Petitioner has failed to establish any other legal basis for revoking the subpoenas.³ See

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² Member Miscimarra would deny the petition to revoke solely on the ground that it was untimely filed.

³ Although the Board's underlying Decision and Order, 359 NLRB No. 112 (2013), enf'd. No. 13-60364 (5th Cir. 2013), was decided by a panel that included two persons whose appointments to the Board were held to be invalid by the United States Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Fifth Circuit's Order upholding the Board's Decision and Order became final prior to the Supreme Court's decision in *NLRB v. Noel Canning*, supra. In these circumstances, we regard the matters finally resolved by the court of appeals as res judicata in this proceeding. See *Chicot County*

generally, *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

Dated, Washington, D.C. June 12, 2015.

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
KENT Y. HIROZAWA,	MEMBER

Drainage District v. Baxter State Bank, 308 U.S. 371, 374-378 (1940); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (cited with approval in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010)); see also *The Lorge School*, 355 NLRB 558, 558 fn. 1 (2010).

Moreover, under Sec. 10(e) of the Act, the Board has no jurisdiction to modify an Order that has been enforced by a court of appeals because, upon the filing of the record with the court of appeals, the jurisdiction of that court is exclusive and its judgment and decree are final, subject to review only by the Supreme Court. *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004) (citing cases), enf. sub nom. *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006). Sec. 10(e) states, in relevant part: "Upon the filing of the record with [the United States court of appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final," except for potential further review by the Supreme Court. 29 U.S.C. § 160(e).

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X		
NATIONAL LABOR RELATIONS BOARD,	:	
	:	
<u>Applicant</u> ,	:	
	:	No. 15 Misc. 233 (JFK)
-against-	:	
	:	OPINION & ORDER
NEW YORK PARTY SHUTTLE, LLC,	:	
	:	
<u>Respondent</u> .	:	
-----X		

JOHN F. KEENAN, United States District Judge:

Before the Court is Respondent New York Party Shuttle, LLC's ("NYPS") motion seeking reconsideration of the Court's August 27, 2015 order, as well as Applicant the National Labor Relations Board's ("the Board") motion for entry of a proposed protective order. Upon review, NYPS' motion for reconsideration is denied, and the Board's motion for entry of a protective order is granted.

The Board brought this action seeking judicial enforcement of a subpoena duces tecum issued to NYPS. In an August 27, 2015 order (ECF No. 14), the Court granted the Board's application for enforcement and directed NYPS to comply with the subpoena. In so doing, the Court found that the subpoena was properly issued as it relates to a matter under investigation by the Board and is relevant to determining the derivative liability of entities that may be associated with NYPS. (*Id.* at 1-2.) NYPS now moves for reconsideration of that decision.

Reconsideration may be appropriate where “the moving party can point to controlling decisions or data that . . . might reasonably be expected to alter the conclusion reached by the court.” Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Where no such controlling decisions or data exist, or where the court has considered and rejected the movant’s position, reconsideration should not be granted. E.g., Grand Crossing, L.P. v. U.S. Underwriters Ins. Co., No. 03 Civ. 5429, 2008 WL 4525400, at *3 (S.D.N.Y. Oct. 6, 2008).

Here, NYPS points to no new facts or controlling precedent that might reasonably change the Court’s conclusion. Rather, NYPS’ arguments merely restate its contention that the Board lacks a proper purpose for requesting the information sought by the subpoena. Having already considered and rejected that argument, the Court finds no basis to reconsider its decision. See Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (recognizing that reconsideration is “not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple” (internal quotation marks omitted)).

Turning to the Board’s proposed protective order, the Court finds that the Board’s proposed language is appropriate and that NYPS’ proposed modifications are unwarranted. While consenting

to most of the Board's proposed order, NYPS seeks the addition of a provision that would delay its response to the subpoena until "14 days from any non-appealable decision of any appeals of the underlying [order] dated August 27, 2015." (ECF No. 18 at 2.) Thus, in effect, NYPS seeks a stay of the Court's August 27, 2015 order pending appeal.

In evaluating whether a stay is warranted, the court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether he will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009). The party seeking the stay bears the burden of showing that the balance of these factors weighs in favor of granting the stay. Natural Res. Def. Council, Inc., v. U.S. Food & Drug Admin., 884 F. Supp. 2d 108, 122 (S.D.N.Y. 2012).

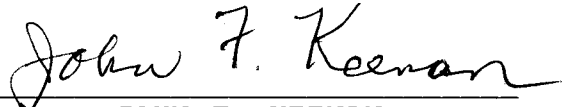
Here, NYPS has failed to demonstrate that a stay is appropriate. First, for the reasons discussed above in addressing NYPS' motion for reconsideration, NYPS' appeal is not likely to succeed on the merits. Second, NYPS has not demonstrated that it will suffer any irreparable injury absent a stay. Although NYPS vaguely references the potential for harm "to the derivative entities if they are forced to produce

private information" (ECF No. 18 at 3), NYPS fails to explain how the potential for any such harm is left unaddressed by the proposed protective order. Lastly, the Court finds that any further delay pending an appeal would unduly impair the Board's investigation and run contrary to the public interest. The Board's subpoena was issued over seven months ago, and NYPS has failed to demonstrate that any additional delay of its compliance is warranted.

For the reasons stated above, NYPS' motion for reconsideration is denied, and the Board's motion for entry of a protective order is granted. Accordingly, the Court will file an order consistent with the terms proposed by the Board.

SO ORDERED.

Dated: New York, New York
November 12, 2015



JOHN F. KEENAN
United States District Judge
Per I